[ORAL ARGUMENT NOT YET SCHEDULED]

No. 19-5199

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

JEFFREY A. LOVITKY,

Plaintiff-Appellant,

v.

DONALD J. TRUMP, in his official capacity as President of the United States,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEE

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), appellee hereby submits the following Certificate as to Parties, Rulings, and Related Cases.

A. Parties and Amici

Appellant is Jeffrey A. Lovitky. The appellee is Donald J. Trump, in his official capacity as President of the United States. There were no intervenors or amici in the district court, and there have been no intervenors or amici in this Court to date.

B. Rulings Under Review

The rulings under review (issued by Judge Kollar-Kotelly) are the memorandum opinion and order filed on July 12, 2019, in case No. 1:19-cv-1454. *See* Order, No. 1:19-cv-1454, ECF 18 (D.D.C. July 12, 2019); Memorandum Opinion, No. 1:19-cv-1454, ECF 19 (D.D.C. July 12, 2019). The memorandum opinion has not yet been published, but is available on Westlaw at 2019 WL 3068344. There is no official citation for the order.

C. Related Cases

This case has not previously been before this Court or any court other than the district court. Counsel for the government is aware of a related case within the meaning of D.C. Circuit Rule 28(a)(1)(C), which was litigated in both the district court and this Court: *Lovitky v. Trump*, No. 1:17-cv-450 (D.D.C. 2018), and *Lovitky v. Trump*, No. 18-5105 (D.C. Cir. Mar. 15, 2019). That case involved the same parties and raised substantially the same issues. The district court dismissed Mr. Lovitky's complaint in

a published opinion on April 10, 2018, that is available at *Lovitky v. Trump*, 308 F. Supp. 3d 250 (D.D.C. 2018). This Court issued a judgment affirming the dismissal on March 15, 2019, and published an opinion that is available at *Lovitky v. Trump*, 918 F.3d 160 (D.C. Cir. 2019). This Court issued the mandate on May 9, 2019. *See Lovitky v. Trump*, No. 18-5105 (D.C. Cir.).

In addition, *Lovitky v. Kushner*, No. 1:17-cv-02693 (D.D.C. 2018), was treated as a related case in the district court. That case was filed by the same pro se plaintiff against advisors to the President in their official capacities and raises similar claims under the Ethics in Government Act of 1978 and Mandamus Act to the present suit. *Lovitky v. Kushner* was previously stayed by the district court pending the outcome of the prior related appeal, s*ee* April 23, 2018 Minute Order, *Lovitky v. Kushner*, No. 1:17-cv-02693 (D.D.C.), and is presently stayed by the district court pending the outcome of this case, *see* May 22, 2019 Minute Order, *Lovitky v. Kushner*, No. 1:17-cv-02693 (D.D.C.).

Respectfully submitted,

/s/ Matthew J. Glover
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GLOSSARY

Ethics Act	The Ethics in Government Act of 1978
JA	Joint Appendix
OGE	Office of Government Ethics

STATEMENT OF JURISDICTION

Plaintiff Jeffrey A. Lovitky invoked the district court's subject matter jurisdiction under 28 U.S.C. §§ 1331, 1361, and 2201. Joint Appendix ("JA") 7. On July 12, 2019, the district court issued an opinion and entered an order dismissing Mr. Lovitky's claims for lack of standing. JA 241-272 (Opinion); 273 (Order). On July 15, 2019, Mr. Lovitky filed a timely notice of appeal. JA 5. This Court has jurisdiction pursuant to 28 U.S.C. § 1291. *See Franklin v. District of Columbia*, 163 F.3d 625, 628 (D.C. Cir. 1998).

STATEMENT OF THE ISSUES

Mr. Lovitky sought a writ of mandamus and declaratory relief compelling the President to refile the financial disclosure reports the President filed in 2018 and 2019. He alleges that the reports were deficient because they did not specify which liabilities were personal and which were non-personal. The district court held that it lacked authority to issue the requested relief against the President, that Mr. Lovitky's allegations failed to meet the basic requirements for the exercise of mandamus jurisdiction, and that the court would not, in any event, exercise its discretion to order such relief.

The questions presented are:

(1) Whether the district court correctly held that it lacked authority to issue the requested relief.

(2) Whether, assuming that the district court had authority to order such relief, its refusal to do so would constitute an abuse of discretion.

PERTINENT STATUTES AND REGULATIONS

The pertinent statutes and regulatory provisions are reproduced in the addendum to Appellant's Brief ("Appellant's Br.") and the addendum to this brief.

STATEMENT OF THE CASE

I. The Ethics In Government Act

In the aftermath of the Watergate scandal, Congress passed the Ethics in Government Act of 1978 ("Ethics Act"). *See* Pub. L. No. 95-521, 92 Stat. 1824 (1978) (codified at 5 U.S.C. app. 4, §§ 101-111). Among other things, the Ethics Act established financial reporting requirements for key personnel in each of the three branches of the federal government and for candidates for certain political offices. 5 U.S.C. app. 4, § 103. As relevant here, the Act requires the President to file an annual financial disclosure report with the Director of the Office of Government Ethics ("OGE"). *Id.* §§ 101(d), (f), 103(b).

The President's financial disclosure report "shall include a full and complete statement with respect to," among other things, the "identity and category of value of the total liabilities owed to any creditor other than [an immediate family member] . . . which exceed $10,000 at any time during the preceding calendar year." 5 U.S.C. app. 4, § 102(a), (a)(4). The report must also include the same disclosure of liabilities owed

by the filer's "spouse[] or dependent child." *Id.* § 102(e)(1)(E). The Act's disclosure requirements exclude mortgages on personal residences for certain filers and loans secured by certain items if the value of the loan does not exceed the purchase price of the security item. *Id.* § 102(a)(4); *see also* 5 C.F.R. § 2634.305(b). Implementing regulations require the financial disclosure report to "identify and include a brief description of the filer's liabilities exceeding $10,000," including "the name of the creditors to whom such liabilities are owed" and the value of liabilities by certain ranges. 5 C.F.R. § 2634.305(a).

Executive branch personnel, including the President, file financial disclosure reports through Office of Government Ethics Form 278e. JA 12 (Compl. ¶ 16, *Lovitky v. Trump*, No. 1:19-cv-1454, ECF 1).[1] Disclosure of the liabilities required by 5 U.S.C. app. 4, § 102(a)(4) is made in Part 8 of OGE Form 278e. JA 13 (Compl. ¶ 19). The instructions for Part 8 direct filers to "[r]eport liabilities over $10,000 that you, your spouse, or your dependent child owed at any time during the reporting period." *Lovitky v. Trump*, 308 F. Supp. 3d 250, 252 (D.D.C. 2018), *aff'd on other grounds*, 918 F.3d 160 (D.C. Cir. 2019).

Neither the Ethics Act, its implementing regulations, nor OGE Form 278e specifies whether a filer must report certain non-personal liabilities, such as liabilities

[1] All citations using "Compl." are to the Complaint in this case. *Lovitky v. Trump*, No. 1:19-cv-1454 (D.D.C.), ECF 1 (JA 6-26).

from a business in which the filer holds an interest. There is also no provision that *prohibits* the reporting of such information. The Ethics Act, regulations, and Form 278e include exceptions to the liability disclosure requirements, but none of those exceptions addresses non-personal business liabilities. *See* 5 U.S.C. app. 4, § 102(a)(4)(A)-(B); 5 C.F.R. § 2634.305(b); JA 40 (Compl. Ex. 25) (OGE Form 278e). And those exceptions are framed in terms of information "not required to be reported," 5 C.F.R. § 2634.305(b), rather than a prohibition on reporting excepted liabilities, *see, e.g.*, 5 U.S.C. app. 4, § 102(a)(4)(B) ("With respect to revolving charge accounts, only those with an outstanding liability which exceeds $10,000 as of the close of the preceding calendar year need be reported.").

The Ethics Act and its implementing regulations establish detailed procedures for agency review of financial disclosure reports. *See* 5 U.S.C. app. 4, § 106; 5 C.F.R. § 2634.605. These provisions require reviewing officials to approve the financial disclosure report if they deem it compliant with the Ethics Act, request additional information from the filer if they deem it necessary to do so, or notify the filer that the report is not in compliance with the Ethics Act and recommend remedial steps to achieve compliance. *See* 5 U.S.C. app. 4, § 106(b); 5 C.F.R. § 2634.605(b).

The Ethics Act does not create a private right of action or any mechanism for private enforcement. Instead, it authorizes the Attorney General to "bring a civil action" in federal court "against any individual who knowingly and willfully falsifies or

who knowingly and willfully fails to file or report any information that such individual is required to report" under the Ethics Act. 5 U.S.C. app. 4, § 104(a)(1). The Act instructs the Director of the Office of Government Ethics and other agency officials to "refer to the Attorney General the name of any individual" whom that official "has reasonable cause to believe has willfully failed to file a report or has willfully falsified or willfully failed to file information required to be reported." *Id.* § 104(b).

Section 105 of the Ethics Act further provides that financial disclosure reports be "made available to the public" upon "written application" by any person stating that person's name, occupation, address, and agreement to abide by certain limitations on use of the report. *Id.* § 105(a)(2), (b)(2). The Act further specifies that the application "shall be made available to the public." *Id.* § 105(b)(2). OGE has made copies of reports filed by the President available on its website "without any requirement for a separate application." JA 12 (Compl. ¶ 15).

II. Facts And Prior Proceedings

A. The President's Financial Disclosures

Mr. Lovitky alleges that as a candidate for the Presidency, President Trump filed a financial disclosure report with OGE using Form 278e on May 16, 2016. JA 11-12 (Compl. ¶ 15). Mr. Lovitky further alleges that while in office, President Trump has filed financial disclosure reports with OGE on May 15, 2017, May 15, 2018, and May 15, 2019. JA 9 (Compl. ¶ 9). In Part 2 of Form 278e in each of these reports,

President Trump identified various business entities in which he has a financial interest and provided a brief description of the underlying assets of those entities. JA 12 (Compl. ¶ 16).

In Part 8 of Form 278e in each of these reports, President Trump listed financial liabilities, identified the creditor for each liability, and described the nature and terms of each liability. JA 12 (Compl. ¶ 16). President Trump did not specify whether the listed liabilities were personal or non-personal, which is not required by the form's instructions. JA 12-17 (Compl. ¶¶ 16, 17-26). President Trump "certified his financial disclosures as being 'true, complete and correct.'" JA 11 (Compl. ¶ 14) (emphasis omitted). The "appropriate reviewing officials" determined that President Trump's disclosures were "in apparent compliance with the disclosure requirements of the Ethics in Government Act." *Id.*

On or about December 15, 2016, Mr. Lovitky filed an application through the OGE website seeking a copy of then–President Elect Trump's May 16, 2016 financial disclosure report. JA 11-12 (Compl. ¶ 15). On December 19, 2016, OGE sent Mr. Lovitky an email with copies of the report attached. JA 12 (Compl. ¶ 15). Copies of the President's 2017, 2018, and 2019 disclosure reports are available on the OGE website without requesting the reports. *Id.*

B. Mr. Lovitky's Prior Suit

On March 14, 2017, Mr. Lovitky filed suit in district court. *Lovitky v. Trump*, No. 1:17-cv-450, 308 F. Supp. 3d 250, 253 (D.D.C. 2018) (*Lovitky I*). On July 30, 2017, Mr. Lovitky filed a second amended complaint. *Id.*, No. 1:17-cv-450, ECF 16 (*Lovitky I* Compl.). That complaint contained allegations nearly identical to the allegations raised in this suit. It sought relief under the Mandamus Act against President Trump in his official capacity, alleging then, as now, that the President's May 2016 financial disclosure report included both personal and business liabilities and that this violated the Ethics Act and its implementing regulations, which Mr. Lovitky argued require disclosure only of those liabilities for which candidates are themselves liable. *Lovitky I*, 308 F. Supp. 3d at 253. Like the instant suit, Mr. Lovitky's first suit further alleged that President Trump had a "non-discretionary duty to specifically identify the liabilities for which he is personally obligated." *Id.*

Mr. Lovitky did not allege that the President failed to disclose any required liabilities in his financial disclosure report. Nor did he claim that any of the disclosures included in Part 8 of Form 278e were inaccurate, or that OGE failed to provide him with the proper form. Rather, Mr. Lovitky alleged that the claimed commingling of personal and non-personal liabilities in Part 8 made "it impossible to identify which of the liabilities on the financial disclosure report were the liabilities of the President," and that the President's financial disclosure report thus did not

provide a "'full and complete statement' of [the President's] liabilities" as required by the Ethics Act and its implementing regulations. *Lovitky I* Compl. ¶¶ 1, 44 (emphasis omitted).

The complaint in Mr. Lovitky's prior suit asked for relief identical to that sought here: an order "directing the President to amend his financial disclosure report . . . for the purpose of specifically identifying any debts he owed during the . . . reporting period." *Lovitky I* Compl. ¶ 51, p. 14; *see also* JA 25, 26 (Compl. ¶ 56, p. 21). In the prayer for relief, Mr. Lovitky also requested "a declaratory judgment that the President violated" the Ethics Act and its implementing regulations "by failing to provide a full and complete statement of his liabilities" on his financial disclosure statement. *Lovitky I* Compl. p. 14; *see also* JA 26 (Compl. p. 21).

The district court dismissed, holding that Mr. Lovitky lacked Article III standing because the court could not "issue the relief that [he] requests" and thus "cannot redress [his] grievance." *Lovitky I*, 308 F. Supp. 3d at 260. This Court affirmed on different grounds. *Lovitky v. Trump*, 918 F.3d 160 (D.C. Cir. 2019) (*Lovitky II*). This Court held that the Mandamus Act does not apply to duties directed at candidates for public office, and that because Mr. Lovitky only challenged then-candidate Trump's 2016 financial disclosure report, the Mandamus Act did not provide jurisdiction. *Lovitky II*, 918 F.3d at 163.

C. The Present Suit

In this suit Mr. Lovitky challenges President Trump's May 15, 2018, and May 15, 2019, financial disclosure reports on the same grounds as those set out in his prior action. JA 6, 12-17, 26 (Compl. ¶¶ 1, 17-26, p. 21). He does not allege that the President failed to disclose any required liabilities in his financial disclosure reports or that any of the disclosures included in Part 8 of the reports were inaccurate. Rather, Mr. Lovitky alleges that the listing of personal and non-personal liabilities in the reports made "it impossible to identify exactly which liabilities listed on Part 8 of the President's financial disclosure statements represent personal liabilities," and that the President's financial disclosure report therefore did not provide a "'full and complete statement'" of the President's liabilities as required by the Ethics Act and its implementing regulations. JA 23, 26 (Compl. ¶ 45, p. 21); *see also Lovitky I* Compl. ¶¶ 1, 44.

The single count of the complaint seeks an order under the Mandamus Act compelling the President "to amend his financial disclosure reports dated May 15, 2018 and May 15, 2019, for the purpose of specifically identifying any liabilities that he was required to report." JA 26 (Compl. p. 21). It also seeks "a declaratory judgment that the President" violated provisions of the Ethics Act and implementing regulations "by failing to provide a full and complete statement of personal liabilities on his May 15, 2018 and May 15, 2019 financial disclosure statements." *Id.*

On July 12, 2019, the district court dismissed, holding that Mr. Lovitky lacks Article III standing because the court could not "issue mandamus, injunctive, or declaratory relief against a sitting President to compel official action," and that Mr. Lovitky's "alleged injury is not redressable." JA 262 (slip op. 22). The court further held that Mr. Lovitky "has no clear right to relief," JA 266 (slip op. 26), because the President "has no ministerial duty" to distinguish between personal and non-personal liabilities in his financial disclosure reports, and that the court thus "lacks mandamus jurisdiction over Mr. Lovitky's case," JA 270 (slip op. 30). Finally, the district court held that even if "the Court had jurisdiction under the Mandamus Act," it would exercise its discretion not to grant mandamus-type or declaratory relief in this case. JA 271-72 (slip op. 31-32).

SUMMARY OF ARGUMENT

Mr. Lovitky seeks mandamus-type relief compelling the President to amend his 2018 and 2019 financial disclosure reports and a declaratory judgment that the President violated the Ethics Act in filing those reports. The district court correctly dismissed Mr. Lovitky's suit because it lacked authority to issue the requested relief. This Court and the Supreme Court have made clear that courts lack authority to issue mandamus-type or injunctive relief against the President in his official capacity. *See Newdow v. Roberts*, 603 F.3d 1002, 1012 (D.C. Cir. 2010); *Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475, 501 (1866).

Even if Mr. Lovitky's suit were not directed solely against the President, his claims do not plausibly invoke this Court's mandamus jurisdiction. Those "invoking the court's mandamus jurisdiction must have a 'clear and indisputable' right to relief," and even then "whether mandamus relief should issue is discretionary." *In re Cheney*, 406 F.3d 723, 729 (D.C. Cir. 2005) (en banc). Mr. Lovitky cannot show a clear statutory right to have the President file a financial disclosure report that specially labels personal liabilities, nor can he point to any provision in the Ethics Act that compels the President to label his liabilities in that way. Moreover, the Ethics Act has an enforcement mechanism that does not contemplate private involvement. And, in any event, the Act's text does not prohibit the listing of non-personal liabilities in financial disclosure reports. To the contrary, the Act *requires* the listing of some such liabilities, and does not require labeling personal and non-personal liabilities.

Similarly, the district court did not abuse its discretion in holding it would decline to grant Mr. Lovitky mandamus-type or declaratory relief.

STANDARD OF REVIEW

This Court reviews a district court's dismissal for lack of jurisdiction de novo. *National Parks Conservation Ass'n v. Manson*, 414 F.3d 1, 4 (D.C. Cir. 2005). The Court "may affirm on different grounds the judgment of a lower court 'if it is correct as a matter of law.'" *Kleiman v. Department of Energy*, 956 F.2d 335, 339 (D.C. Cir. 1992) (quoting *United States v. Garrett*, 720 F.2d 705, 710 (D.C. Cir. 1983) (Bork, J.)). This

Court reviews for abuse of discretion the district court's decision not to exercise its discretion to grant mandamus-type or declaratory relief. *In re Medicare Reimbursement Litig.*, 414 F.3d 7, 10 (D.C. Cir. 2005) (mandamus-type relief); *ACLU Found. of S. Cal. v. Barr*, 952 F.2d 457, 466 (D.C. Cir. 1991) (declaratory relief).

ARGUMENT

I. The District Court Correctly Concluded That It Lacked Authority To Issue the Requested Relief

Mr. Lovitky alleges that President Trump's 2018 and 2019 financial disclosure reports included, in addition to debts for which the President is personally liable, others for which his business entities, but not he himself, are liable. JA 245 (slip op. 5) (citing Compl. ¶¶ 17-21). Mr. Lovitky claims that the President's asserted "commingling of personal liabilities with non-personal liabilities . . . makes it impossible to identify exactly which liabilities listed on Part 8 of the President's financial disclosure statements" were the liabilities of the President, in violation of Ethics Act statutory and implementing provisions. *Id.* (quoting Compl. ¶ 45) (alterations omitted). On this basis, Mr. Lovitky seeks "relief in the nature of mandamus" "directing the President to amend his financial disclosure reports dated May 15, 2018 and May 15, 2019, for the purpose of specifically identifying the liabilities that he was required to report," JA 25 (Compl. ¶ 56), and an accompanying declaratory judgment that the President violated various statutory provisions "by

failing to provide a full and complete statement of personal liabilities on his May 15, 2018 and May 15, 2019 financial disclosure statements," JA 26 (Compl. p. 21).

The district court correctly concluded that it had no authority to issue the requested relief because mandamus-type or declaratory relief against a sitting present is unavailable and because Mr. Lovitky has not identified any action unlawfully withheld that the court could properly order. This Court may affirm on either ground, both of which support the district court's conclusion that Mr. Lovitky's asserted injury is not redressable and that the court "lacks mandamus jurisdiction over Mr. Lovitky's case." JA 270 (slip op. 30).

A. The District Court Correctly Recognized That Equitable Relief Against The President Is Generally Unavailable

1. Courts have long recognized the serious separation of powers concerns implicated in ordering equitable relief against the President. As this Court has explained, "the President, like Congress, is a coequal branch of government, and for the President to be ordered to perform particular executive . . . acts at the behest of the Judiciary, at best creates an unseemly appearance of constitutional tension and at worst risks a violation of the constitutional separation of powers." *Swan v. Clinton*, 100 F.3d 973, 978 (D.C. Cir. 1996) (alteration in original; quotation marks and citation omitted).

This Court in *Newdow v. Roberts*, 603 F.3d 1002 (D.C. Cir. 2010), applied those principles to a suit seeking declaratory and injunctive relief barring religious elements

of the presidential inauguration ceremony. *Id.* at 1006. The Court concluded that the plaintiffs' asserted injuries were not redressable because the "only apparent avenue of redress for plaintiffs' claimed injuries would be injunctive or declaratory relief against all possible President-elects and the President himself." *Id.* at 1013. The Court further explained that "courts do not have jurisdiction to enjoin [the President], and have never submitted the President to declaratory relief." *Id.* (citing *Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475, 501 (1866), and *Franklin v. Massachusetts*, 505 U.S. 788, 827-28 (1992) (Scalia, J., concurring)). The Court stressed that a "court—whether via injunctive or declaratory relief—does not sit in judgment of a President's executive decisions." *Id.* at 1012.

Mr. Lovitky does not advance his argument by observing that the President was not a named party in *Newdow*. Appellant's Br. 25. As discussed, the *Newdow* Court recognized that the plaintiffs' claims could be redressed only by declaratory or injunctive relief against the President and President-elects, and held that because such relief was unavailable as a general matter, the plaintiffs' claimed injuries could not be redressed by a court order. *Newdow*, 603 F.3d at 1013. That the President was not a named defendant only underscored the Court's concern with taking action that would require issuing declaratory or injunctive relief against the President.

Newdow reflects the longstanding recognition that "in general 'th[e] court has no jurisdiction of a bill to enjoin the President in the performance of his official duties.'"

Franklin v. Massachusetts, 505 U.S. at 802-03, 806 (plurality op.) (quoting *Johnson*, 71 U.S. (4 Wall.) at 501). While emphasizing this principle, the plurality in *Franklin* concluded that a challenge to the implementation of the census was nevertheless justiciable because, in the words of the *Newdow* Court, "the Commerce Secretary was obligated by statute to provide the President with a report of the nation's total population[,] which the President consults before sending his own statutorily required report to Congress showing the population of each state for purposes of apportioning the number of representatives in the House of Representatives." 603 F.3d at 1013 (citing *Franklin*, 505 U.S. at 799). As the *Newdow* Court further explained, "the Commerce Secretary was legally responsible for providing the President with advice and information on which he would base his final decision," and accordingly, "a plurality of the Supreme Court thought declaratory relief applicable to the Secretary's legal duty would make it 'likely' the President would take the action desired by the plaintiffs, even if he was not obligated to do so." *Id.* (citing *Franklin*, 505 U.S. at 803). Justice Scalia's concurrence in *Franklin*, for its part, concluded that the plaintiffs lacked standing because their claims were not redressable absent action by the President, and that under *Johnson*, courts may not enjoin or order declaratory relief against the President in his official capacity. *See Franklin*, 505 U.S. at 826 (Scalia, J.,

concurring) ("I think it clear that no court has authority to direct the President to take an official act.").[2]

As this Court explained in *Newdow,* the plurality holding in *Franklin* turned on the pivotal role of the Secretary of Commerce (the named defendant) in the census process, such that granting relief against the Secretary would make it more "likely" that the President would take the action the plaintiffs desired. 603 F.3d at 1012-13; *see also Franklin*, 505 U.S. at 803 (plurality op.). There was no similarly pivotal role by a non-presidential actor in *Newdow* and thus no standing. 603 F.3d at 1012-13. And in this case, the only defendant is the President, and relief would run exclusively against him. Thus, under both *Newdow* and *Franklin*, relief against the President is unavailable here.

[2] Contrary to Mr. Lovitky's contention, the Supreme Court did not hold "that a declaratory judgment against the President may be issued" in *Clinton v. City of New York*, 524 U.S. 417 (1998). Appellant's Br. 27. *City of New York* was a challenge to the Line Item Veto Act, and the relief issued was a declaratory judgment that struck down the statute and nullified the statutory power of the President to wield a line item veto pen. As this Court explained in *Newdow*, *City of New York* "was, in other words, a basic case of judicial review of legislation." 603 F.3d at 1012. Moreover, despite analyzing three separate jurisdictional issues in *City of New York*—whether jurisdiction existed under 2 U.S.C. § 692(a)(1), whether the constitutionality of the Line Item Veto Act was nonjusticiable, and whether the plaintiffs suffered an injury in fact sufficient for standing—the Supreme Court did not consider, and the United States did not argue, whether it was proper to issue a declaratory judgment against the President. *See City of New York*, 524 U.S. at 428-35; Appellants' Br., *City of New York*, *supra* (No. 97-1374), 1998 WL 263832; Appellants' Reply Br., *City of New York*, *supra*, 1998 WL 181947.

2. The district court correctly rejected Mr. Lovitky's attempted reliance on *National Treasury Employees Union v. Nixon*, 492 F.2d 587, 616 (D.C. Cir. 1974) ("*NTEU*"), and *National Wildlife Federation v. United States*, 626 F.2d 917, 923 (D.C. Cir. 1980), which concluded that very limited relief might be ordered against the President to compel a "ministerial" act. *NTEU* is not, as Mr. Lovitky claims, the "controlling legal authority in this [C]ircuit on whether the President may be mandamused." Appellant's Br. 19. First, as the district court noted, "[w]hatever window that *NTEU* may have opened in this Circuit began to close with the Supreme Court's opinions in *Franklin*," JA 258 (slip op. 18), and this Court has "expressly cast doubt on any remaining viability of *NTEU* and *National Wildlife*," JA 259 (slip op. 19). Indeed, this Court itself has stated that "[i]t is not entirely clear . . . whether, and to what extent, these decisions remain good law after [the Supreme Court's decision in] *Franklin*." *Swan v. Clinton*, 100 F.3d at 978. This Court in *Swan* further observed that "while the Court in *Franklin* explicitly left open the question of whether a court may enjoin the President to perform a ministerial duty, it also issued a stern admonition that injunctive relief against the President personally is an extraordinary measure not lightly to be undertaken." *Id.* Second, as noted, this Court in *Newdow* unequivocally

stressed that "[w]ith regard to the President, courts do not have jurisdiction to enjoin him." 603 F.3d at 1013 (citing *Johnson* and *Franklin*).[3]

Chamber of Commerce v. Reich, 74 F.3d 1322 (D.C. Cir. 1996), and *Mountain States Legal Foundation v. Bush*, 306 F.3d 1132 (D.C. Cir. 2002), are similarly unhelpful to Mr. Lovitky. *See* Appellant's Br. 24. The President was not named as a party in *Reich*, which held that an Executive Order was preempted by the National Labor Relations Act. 74 F.3d at 1332-39. The Court there concluded that a suit against the Secretary of Labor could go forward because "courts have power to compel *subordinate* executive officials to disobey illegal Presidential commands." *Id.* at 1328 (emphasis added) (quoting *Soucie v. David*, 448 F.2d 1067, 1072 n.12 (D.C. Cir. 1971)). In *Mountain States,* the President was named as one of several defendants; thus, the Court did not need to address the availability of injunctive or declaratory relief against the President when it rejected plaintiffs' claims on the merits. The passage from *Mountain States* Mr. Lovitky quotes, Appellant's Br. 24, simply noted that the Supreme Court has permitted ultra vires review of presidential proclamations made under the Antiquities Act. *Mountain States*, 306 F.3d at 1136.

3. In light of the separation of powers concerns that arise when a court attempts to enjoin the President, the Supreme Court has twice squarely held that, at a

[3] Even if, as Mr. Lovitky suggests *NTEU* were the Circuit's controlling precedent, as explained below, Mr. Lovitky does not even come close to showing the President has a ministerial duty to label liabilities as personal and non-personal. *See infra* I.B.

minimum, a clear statement by Congress is required before a general cause of action will be construed to extend to the President for his official conduct. *See Franklin*, 505 U.S. at 800-01; *Nixon v. Fitzgerald*, 457 U.S. 731, 748, n.27 (1982). Because there is no clear statement in the Ethics Act or Mandamus Act providing a cause of action against the President for his official conduct, the Court should not construe any general cause of action in either Act to reach him.

In *Nixon*, the Supreme Court held that "the President is absolutely immune from civil damages liability for his official acts in the absence of explicit affirmative action by Congress." 457 U.S. at 748 n.27. It thus rejected application of *Bivens* and implied statutory damages claims against the President in the absence of an express statutory command. *Id.* Similarly, in *Franklin*, the Supreme Court plurality rejected application of Administrative Procedure Act ("APA") review to the President's actions. *Franklin*, 505 U.S. 800-01. The plurality instructed that "[o]ut of respect for the separation of powers and the unique constitutional position of the President, we find that textual silence is not enough to subject the President to the provisions of the APA," and that it "would require an express statement by Congress before assuming it intended the President's performance of his statutory duties to be reviewed for abuse of discretion." *Id.*

Here, *Nixon* forecloses any implied cause of action in equity against the President, including mandamus or declaratory relief, and *Franklin* forecloses statutory

relief under the Ethics Act or Mandamus Act. *See Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1384 (2015); *see also id.* at 1385 ("The power of federal courts of equity to enjoin unlawful executive action is subject to express and implied statutory limitations."). Given that Mr. Lovitky cannot identify an express cause of action against the President, his claim against the President necessarily fails.

* * *

In sum, the district court correctly applied the principles established by the Supreme Court and this Court in concluding that it lacked authority to issue the requested relief in this case and that Mr. Lovitky's asserted injury therefore could not be redressed by a judicial order.

B. Mr. Lovitky's Claims Do Not Satisfy The Prerequisites For Invoking A Court's Mandamus Jurisdiction

As the district court's opinion makes clear, dismissal would be necessary even if the requested relief did not run directly against the President. The district court correctly explained that the President "has no ministerial duty" to distinguish between personal and non-personal liabilities in his financial disclosure reports and that the court therefore "lacks mandamus jurisdiction over Mr. Lovitky's case." JA 270 (slip op. 30).

"[M]andamus is drastic; it is available only in extraordinary situations," and is "hardly ever granted." *In re Cheney*, 406 F.3d 723, 729 (D.C. Cir. 2005) (en banc) (quotation marks omitted). "Jurisdiction over actions 'in the nature of mandamus'

under [28 U.S.C.] § 1361, like jurisdiction over the now-abolished petitions for writs of mandamus, is strictly confined." *Id.* Parties "invoking the court's mandamus jurisdiction must have a 'clear and indisputable' right to relief," and even then "whether mandamus relief should issue is discretionary." *Id.*

As this Court has explained, a court "may grant mandamus relief 'only if: (1) the plaintiff has a clear right to relief; (2) the defendant has a clear duty to act; and (3) there is no other adequate remedy available to plaintiff.'"[4] *Baptist Mem. Hosp. v. Sebelius*, 603 F.3d 57, 62 (D.C. Cir. 2010) (quoting *Power v. Barnhart*, 292 F.3d 781, 784 (D.C. Cir. 2002)); *see also Oglala Sioux Tribe of Pine Ridge Indian Reservation v. U.S. Army Corps of Eng'rs*, 570 F.3d 327, 333-34 (D.C. Cir. 2009) (explaining that a "plaintiff seeking mandamus relief has the burden of showing that the defendant owes it a 'clear and compelling' duty, a duty 'so plainly prescribed as to be free from doubt and equivalent to a positive command'" (citation omitted) (quoting *In re Cheney*, 406 F.3d at 729, and *Consolidated Edison Co. of N.Y. v. Ashcroft*, 286 F.3d 600, 605 (D.C. Cir. 2002))).

[4] Although often referred to as "mandamus relief," as this Court has recognized, "it is not technically accurate to speak of . . . actions as petitions for a writ of mandamus. Rule 81(b) of the Federal Rules of Civil Procedure long ago abolished the writ of mandamus in the district courts . . . [but] permitted relief heretofore available by mandamus to be obtained by actions brought in compliance with the rules." *In re Cheney*, 406 F.3d at 728-29 (alteration and quotation marks omitted). Thus, although it is more accurate to refer to "mandamus-type relief," *id.*, this Court often uses the shorthand "mandamus relief." *Id.* at 729.

"These three threshold requirements are jurisdictional; unless all are met, a court must dismiss the case for lack of jurisdiction." *American Hosp. Ass'n v. Burwell*, 812 F.3d 183, 189 (D.C. Cir. 2016). Mr. Lovitky's suit cannot satisfy these requirements and thus was properly dismissed by the district court.

1. As an initial matter, exercise of the Court's mandamus jurisdiction would be particularly anomalous here because Congress clearly did not contemplate a private role in enforcing the Ethics Act's provisions. *See In re Kaminski*, 960 F.2d 1062, 1064 (D.C. Cir. 1992) (per curiam) ("[T]he Ethics Act is barren of any evidence that Congress intended to create procedural rights in members of the public to have their allegations investigated."). The Ethics Act establishes a detailed scheme providing for both administrative review of financial disclosure reports and civil and criminal enforcement for willful violations of the reporting requirements; it does not contemplate actions for private enforcement. Congress plainly intended this scheme to be exclusive and did not contemplate that private persons would embroil the judiciary in disputes about alleged errors in public filings.[5] *Cf. Grosdidier v. Chairman, Broad. Bd. of Governors*, 560 F.3d 495, 497 (D.C. Cir. 2009) (reasoning that "Congress

[5] Mr. Lovitky worries that unless the President is subjected to a private enforcement action he would not be subject to the Ethics Act's enforcement scheme at all. Appellant's Br. 55. But, as the district court concluded, such a result "would simply reinforce that Congress adopted a statutory scheme that expressly provides for certain methods of enforcement and does not contemplate others." JA 266 (slip op. 26) (citing *United States v. Thompson*, 921 F.3d 263, 266 (D.C. Cir. 2019)).

designed the [Civil Service Reform Act's] remedial scheme with care" and declining to permit employees to "end-run" the statutory scheme by use of other remedial measures).

Under the Ethics Act and implementing regulations, the Director of the Office of Government Ethics and other agency officials oversee the filing of financial disclosure reports. *See* 5 U.S.C. app. 4, §§ 106, 111; 5 C.F.R. § 2634.605. Reviewing officials must approve a financial disclosure report as compliant with the Ethics Act, request additional information from the filer, or notify the filer that he is not in compliance with the Act and recommend remedial steps to achieve compliance. 5 U.S.C. app. 4, § 106(b); 5 C.F.R. § 2634.605(b). This process permits the filer to respond to any finding of potential non-compliance. 5 U.S.C. app. 4, § 106(b)(2)(B); 5 C.F.R. § 2634.605(b)(5). The Ethics Act does not contemplate, or even hint at, any role for third parties to police the filer's compliance with reporting requirements. Mr. Lovitky conflates the public's statutory right to access approved reports, 5 U.S.C. app. 4, § 105, with a public right to seek a court order compelling a filer to amend or supplement the contents of a financial disclosure report. The statute provides no such public right.

In addition to the administrative review scheme, the Ethics Act provides an enforcement scheme that vests the Attorney General with exclusive authority to bring civil or criminal actions to redress willful violations of the reporting requirements that

cannot be resolved through the administrative review mechanism. 5 U.S.C. app. 4, § 104(a)(1). As the legislative history of the statute emphasizes, "inadvertent or technical violation[s] [should] be handled by the supervising ethics office through informal means or administrative action short of either a civil penalty . . . or a criminal penalty." *See* S. Rep. No. 95-170, at 140 (1977), *as reprinted in* 1978 U.S.C.C.A.N. 4216, 4356 (alteration in capitalization).

This Court and other courts have uniformly rejected attempts to enforce the Ethics Act through private suits, whether brought under the Act itself or under the Mandamus Act. *See, e.g.*, *In re Madison Guar. Sav. & Loan Ass'n*, 173 F.3d 866, 868 (D.C. Cir. 1999) (per curiam) ("[T]his court and others have . . . consistently found no congressional intent to create . . . a cause [of action]" in the Ethics Act.). While these suits have generally involved demands for investigations, their analysis of the Ethics Act's text and overall statutory scheme is equally applicable here.[6] For example, in

[6] Two district court decisions have addressed challenges to the Ethics Act's reporting requirements, and in both cases the court found no private right of action in the Act. *See Scherer v. United States*, 241 F. Supp. 2d 1270, 1284 (D. Kan. 2003) (dismissing claim under the Ethics Act because the Act "does not provide an express or implied private right of action" and OGE's "implementing regulations preclude a private right of action" under the Act's disclosure provisions), *aff'd sub nom., Scherer v. U.S. Dep't of Educ.*, 78 F. App'x 687 (10th Cir. 2003); *Postell v. Fifth Third Bank*, No. 6:13-cv-60-ORL-36-TBS, 2013 WL 2043420, at *2 (M.D. Fla. Apr. 26, 2013) (dismissing claim alleging violation of the Ethics Act's reporting requirements because "Congress vested the Attorney General with the authority to initiate a civil action . . . and did not provide individuals with a private right of action in the financial disclosure statute" (citation omitted)) *report & recommendation adopted*, 2013 WL 2042805 (M.D. Fla. May 15, 2013).

Nathan v. Smith, this Court reversed a district court's grant of relief to a private citizen who sought to compel the Attorney General to conduct a preliminary investigation pursuant to the Ethics Act. 737 F.2d 1069, 1070 (D.C. Cir. 1984) (per curiam). Concurring in the dismissal, Judge Bork noted that the Act "contains nothing that even suggests a private cause of action," and that "by conferring very broad discretion upon the Attorney General, the text strongly indicates that private remedies are precluded." *Id.* at 1080 (Bork, J., concurring); *see also In re Visser*, 968 F.2d 1319, 1324 (D.C. Cir. 1992); *Dellums v. Smith*, 797 F.2d 817, 823 (9th Cir. 1986). In analogous circumstances, this Court recently held that a plaintiff could not establish a clear and indisputable right to relief under the Presidential Records Act, pointing to precedent recognizing the "intricate statutory scheme Congress carefully drafted to keep in equipoise important competing political and constitutional concerns" in that statute. *Citizens for Responsibility & Ethics in Wash. v. Trump*, 924 F.3d 602, 608 (D.C. Cir. 2019).

Mr. Lovitky seeks to overcome the lack of any private right to sue under the Ethics Act by relying on a purported "statutory and non-statutory right to judicial review of the President's financial disclosures" based on the fact that he is seeking "relief in the nature of mandamus." Appellant's Br. 47-48; *see generally id.* at 47-55. But, as the district court recognized, JA 265 (slip op. 25), this argument "has the whiff of a red herring," *Conservation Law Found. v. FERC*, 216 F.3d 41, 46 (D.C. Cir. 2000), and the court "need not pursue" it, *Maggio v. Wisconsin Ave. Psychiatric Ctr.*, 795 F.3d 57,

60 n.4 (D.C. Cir. 2015). Mr. Lovitky's burden to show that he has a clear right to the relief he requests is a threshold jurisdictional prerequisite to mandamus-type relief. *See American Hosp. Ass'n*, 812 F.3d at 189. The lack of a private right of action in the Ethics Act is evidence that Congress did not grant Mr. Lovitky the right to his requested relief, much less that such an alleged right is "clear." Moreover, as noted above, the Supreme Court has explicitly declined to extend a general cause of action to the President absent a clear statement by Congress. *See supra* at 19 (citing *Franklin*, 505 U.S. at 800-801; *Nixon*, 457 U.S. at 748 n.27).

2. In any event, Mr. Lovitky singularly fails to identify any requirement that the President label his liabilities as "personal" and "non-personal," much less any provision that creates a "clear and compelling duty," to do so, *i.e.*, one "so plainly prescribed as to be free from doubt and equivalent to a positive command." *Oglala Sioux Tribe of Pine Ridge Indian Reservation*, 570 F.3d at 333-34; *see also Shoshone Bannock Tribes v. Reno*, 56 F.3d 1476, 1480 (D.C. Cir. 1995) ("A court may properly issue a writ of mandamus only if 'the duty to be performed is ministerial and the obligation to act peremptory and clearly defined. The law must not only authorize the demanded action, but require it; the duty must be clear and undisputable.'"); *Power v. Barnhart*, 292 F.3d 781, 786 (D.C. Cir. 2002) (explaining that when an alleged duty is not "plainly prescribed, but depends on a statute or statutes the construction or application of which is not free from doubt, it is regarded as involving the character of judgment or

discretion which cannot be controlled by mandamus" (quoting *Consolidated Edison Co. of N.Y.*, 286 F.3d at 605)).

Mr. Lovitky does not allege that the President failed to disclose any reportable liabilities in his financial disclosure reports. Instead, he asserts that the President had a "non-discretionary duty to specifically identify the personal liabilities that he was required to disclose." JA 23 (Compl. ¶ 47). Nothing in the Ethics Act or its implementing regulations imposes a requirement that the President specifically designate personal and non-personal liabilities. Rather, as the district court correctly concluded, there is "no doubt that the statute does *not* plainly establish the duty that Mr. Lovitky asks this Court to compel." JA 267 (slip op. 27).

The Act provides that a financial disclosure report "shall include a full and complete statement with respect to . . . [t]he identity and category of value of the total liabilities owed to any creditor . . . which exceed $10,000 at any time during the preceding calendar year." 5 U.S.C. app. 4, § 102(a)(4). The implementing regulations further clarify that financial disclosure reports "must identify and include a brief description of the filer's liabilities exceeding $10,000 owed to any creditor at any time during the reporting period, and the name of the creditors to whom such liabilities are owed." 5 C.F.R. § 2634.305(a). The regulations also specify that the "category of value" identified should be based on "the greatest amount owed to the creditor during the period." *Id.*

The Ethics Act "does not specify that only personal liabilities are to be listed, and it does not expressly prohibit the listing of non-personal business liabilities." *Lovitky I*, 308 F. Supp. 3d at 257. Rather, the Ethics Act expressly *requires* disclosure of some non-personal liabilities: liabilities of the filer's spouse and dependent children, 5 U.S.C. app. 4, § 102(e)(1)(E), and business liabilities that are "unrelated to the operations of [a] trade or business," JA 55 (Public Financial Disclosure Guide); *see also* JA 18 (Compl. ¶ 29). And when a filer lists both personal and non-personal liabilities, nothing in the statute or regulations requires the filer to take the additional step that Mr. Lovitky requests—identifying which liabilities the filer is personally obligated to pay. This Court should decline to read such a requirement into the statute. *Cf. Oklahoma Aerotronics, Inc. v. United States*, 943 F.2d 1344, 1349 (D.C. Cir. 1991) (declining to read interest awards into statute that created a fee regime with no mention of interest).

The provisions Mr. Lovitky relies on are inapposite. They do not impose a duty on the President to specifically label personal and non-personal liabilities, much less a "clear" or "ministerial" duty. First, Mr. Lovitky points to the Ethics Act's requirement that filers furnish "a full and complete statement" with respect to the information required. Appellant's Br. 41-42 (citing 5 U.S.C. app. 4, § 102(b)(1)(B)). But, as the district court explained, "[n]othing about the 'full and complete statement'

language in Section 102(a) compels the President to differentiate these liabilities as Mr. Lovitky requests." JA 267 (slip op. 27).

Second, Mr. Lovitky notes that the implementing regulation instructs the filer (the "reporting individual") to disclose the "filer's liabilities." Appellant's Br. 40 (emphasis omitted) (citing 5 C.F.R. §§ 2634.105(g), 2634.305(a)). But this argument is circular. The question is whether a "filer's liabilities" clearly and indisputably include only personal liabilities and, if so, whether the regulation clearly and indisputably bars a cautious filer from including non-personal liabilities as well. The reference to a "filer's liabilities" in the regulation is not unambiguous and, in any event, it does not establish an indisputable prohibition on listing non-personal liabilities. *See Lovitky I*, 308 F. Supp. 3d at 258 ("If Defendant chose to disclose more than strictly necessary, that would not be unlawful on the basis of any provision that Plaintiff cites.").

Third, Mr. Lovitky invokes the implementing regulations' requirement that officials take disclosure reports at "face value." Appellant's Br. 44 (emphasis omitted) (citing 5 C.F.R. § 2634.605(b)(3)). This argument also rests on the premise that the President was precluded from including non-personal liabilities in his reports, and adds nothing to Mr. Lovitky's argument.

Fourth, Mr. Lovitky cites language from OGE's Public Financial Disclosure Guide instructing filers to "not include a loan owed by a LLC, unless you, your spouse or dependent child is also personally liable for that same loan." Appellant's Br. 40-41

(emphasis omitted) (quoting JA 228-29). Yet, as the district court noted, the Guide "begin[s] by stating that 'you do not need to report the following liabilities in Part 8,'" and among the categories a filer need not report is "liabilities of a trade or business, unless you, your spouse, or a dependent child is personally liable." JA 268 (slip op. 28) (alterations omitted). Only after these instructions does the parenthetical Mr. Lovitky quotes from appear. *Id.* So the most relevant language from the Guide, addressing business liabilities for which the filer is not personally liable, states only that such liabilities "need not" be reported, not that they cannot (or must not) be reported. Hence, even assuming that the Guide is a source of law that could provide the basis for a writ of mandamus (it is not), it does not impose a clear duty to omit certain non-personal liabilities or to label liabilities as personal or non-personal. Similarly, Mr. Lovitky cites the instructions to OGE Form 278, Appellant's Br. 40, which state that the filer should "[r]eport liabilities over $10,000 that you, your spouse, or your dependent child owed at any time during the reporting period" and then lists exceptions, JA 48. These instructions do not purport to prohibit the inclusion of non-personal liabilities. To the contrary, in specifying items not to be reported, they make no mention of non-personal liabilities. *See* JA 48.

More generally, the Ethics Act lists types of information that are "not required" to be reported, but neither prohibits the reporting of such information nor requires special labeling if such information *is* reported. *See, e.g.*, 5 U.S.C. app. 4, § 102(a)(5)

("Reporting is not required under this paragraph of any transaction solely by and between the reporting individual, his spouse, or dependent children."); *id.* § 102(a)(6)(A) ("This subparagraph shall not require the reporting of positions held in any religious, social, fraternal, or political entity and positions solely of an honorary nature."); *id.* § 102(f)(2)(A) ("A reporting individual need not report the holdings of or the source of income from any of the holdings of . . . any qualified blind trust."); *id.* § 102(f)(8) ("A reporting individual shall not be required to report the financial interests held by a widely held investment fund . . .."); *id.* § 102(g) ("Political campaign funds, including campaign receipts and expenditures, need not be included in any report filed pursuant to this title.").

In any event, a suit of this kind is not an appropriate means for determining the precise contours of the manner in which filers should list liabilities. For present purposes it is sufficient that Congress did not intend for such issues to be resolved in private litigation and that Mr. Lovitky has not identified a clear and compelling non-discretionary duty on the part of the President to separately label personal and non-personal liabilities. Mr. Lovitky's failure to meet the requirements for mandamus-type relief "also disposes of [his] claim[] for declaratory relief." *Citizens for Responsibility & Ethics in Wash.*, 924 F.3d at 610.[7]

[7] Mr. Lovitky appears to argue that his failure to meet the prerequisites for mandamus is not jurisdictional. Appellant's Br. 29-34. Even if Mr. Lovitky were correct that the prerequisites for mandamus are not jurisdictional, however, dismissal would be

II. The District Court Did Not Abuse Its Discretion In Holding That It Would Decline To Grant Relief Even If It Had The Authority To Do So

The district court held that, even assuming that it had the power to issue the requested relief, it would not exercise its discretion to do so. This Court need not reach this issue because, as explained above, the district court correctly concluded that it lacked power to issue the requested relief against the President. If this Court were to reach the question, however the district court plainly did not abuse its discretion in so holding.

When the threshold requirements for mandamus-type relief are met, "whether mandamus relief should issue is discretionary," *In re Cheney*, 406 F.3d at 729, and a court "may grant relief only when it finds compelling equitable grounds," *American Hosp. Ass'n*, 812 F.3d at 189 (quoting *In re Medicare Reimbursement Litig.*, 414 F.3d at 10). Similarly, because the "Declaratory Judgment Act, 28 U.S.C. § 2201, provides only that a district court 'may' declare the 'rights and other legal relations' of the parties, not that it must[,] [t]he decision whether to grant this relief is discretionary." *ACLU Found. of S. Cal.*, 952 F.2d at 466 ; *see generally* Henry J. Friendly, *Indiscretion About Discretion*, 31 Emory L.J. 747, 778-79 (1982).

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necessary because he has failed to meet those prerequisites and the Court "may affirm on different grounds the judgment of a lower court 'if it is correct as a matter of law.'" *Kleiman*, 956 F.2d at 339. As noted above, moreover, this Court has treated failure to meet the mandamus requirements as jurisdictional. *See American Hosp. Ass'n*, 812 F.3d at 189.

As the district court noted, judicial decrees ordering the President to perform particular executive acts raise serious separation of powers concerns. JA 271 (slip op. 31) (citing *Johnson*, 71 U.S. at 497, 499-500); *see also Franklin*, 505 U.S. at 802-03 (plurality op.); *id.* at 826-28 (Scalia, J., concurring). As the district court also recognized, granting relief here would be at odds with the detailed review and enforcement scheme that Congress codified in the Ethics Act. That scheme, at a minimum, militates against judicial review in all but extraordinary circumstances. Nor is there any reason to conclude that the OGE officials who reviewed the President's filings were not properly exercising their responsibilities. As the district court observed, "the 'presumption of regularity' attaching to officials' activities gives further reason not to disturb President Trump's reading of the" Ethics Act. JA 271 (slip op. 31). For all these reasons, the district court did not abuse its discretion in holding that, even if it had power to grant Mr. Lovitky's requested relief, it would not exercise its discretion to do so.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

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OCTOBER 2019

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the requirements of Federal Rule of Appellate Procedure 32(a)(5) and (6) because it has been prepared in 14-point Garamond, a proportionally spaced font.

I further certify that this brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 7696 words, excluding the parts of the brief exempted under Rule 32(f) and D.C. Circuit Rule 32(e), according to the count of Microsoft Word.

/s/ Matthew J. Glover
MATTHEW J. GLOVER
Counsel for Appellee

CERTIFICATE OF SERVICE

I hereby certify that on October 9, 2019, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. I further certify that I will cause eight paper copies of this brief to be filed with the Court within two business days.

The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

/s/ Matthew J. Glover
MATTHEW J. GLOVER
Counsel for Appellee

ADDENDUM

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5 U.S.C. app. 4, § 106

(a)(1) Each designated agency ethics official or Secretary concerned shall make provisions to ensure that each report filed with him under this title is reviewed within sixty days after the date of such filing, except that the Director of the Office of Government Ethics shall review only those reports required to be transmitted to him under this title within sixty days after the date of transmittal.

(2) Each congressional ethics committee and the Judicial Conference shall make provisions to ensure that each report filed under this title is reviewed within sixty days after the date of such filing.

(b)(1) If after reviewing any report under subsection (a), the Director of the Office of Government Ethics, the Secretary concerned, the designated agency ethics official, a person designated by the congressional ethics committee, or a person designated by the Judicial Conference, as the case may be, is of the opinion that on the basis of information contained in such report the individual submitting such report is in compliance with applicable laws and regulations, he shall state such opinion on the report, and shall sign such report.

(2) If the Director of the Office of Government Ethics, the Secretary concerned, the designated agency ethics official, a person designated by the congressional ethics committee, or a person designated by the Judicial Conference, after reviewing any report under subsection (a)--

> **(A)** believes additional information is required to be submitted, he shall notify the individual submitting such report what additional information is required and the time by which it must be submitted, or
>
> **(B)** is of the opinion, on the basis of information submitted, that the individual is not in compliance with applicable laws and regulations, he shall notify the individual, afford a reasonable opportunity for a written or oral response, and after consideration of such response, reach an opinion as to whether or not, on the basis of information submitted, the individual is in compliance with such laws and regulations.

(3) If the Director of the Office of Government Ethics, the Secretary concerned, the designated agency ethics official, a person designated by a congressional ethics committee, or a person designated by the Judicial Conference, reaches an opinion under paragraph (2)(B) that an individual is not in compliance with applicable laws and regulations, the official or committee

shall notify the individual of that opinion and, after an opportunity for personal consultation (if practicable), determine and notify the individual of which steps, if any, would in the opinion of such official or committee be appropriate for assuring compliance with such laws and regulations and the date by which such steps should be taken. Such steps may include, as appropriate--

(A) divestiture,

(B) restitution,

(C) the establishment of a blind trust,

(D) request for an exemption under section 208(b) of title 18, United States Code, or

(E) voluntary request for transfer, reassignment, limitation of duties, or resignation.

The use of any such steps shall be in accordance with such rules or regulations as the supervising ethics office may prescribe.

(4) If steps for assuring compliance with applicable laws and regulations are not taken by the date set under paragraph (3) by an individual in a position in the executive branch (other than in the Foreign Service or the uniformed services), appointment to which requires the advice and consent of the Senate, the matter shall be referred to the President for appropriate action.

(5) If steps for assuring compliance with applicable laws and regulations are not taken by the date set under paragraph (3) by a member of the Foreign Service or the uniformed services, the Secretary concerned shall take appropriate action.

(6) If steps for assuring compliance with applicable laws and regulations are not taken by the date set under paragraph (3) by any other officer or employee, the matter shall be referred to the head of the appropriate agency, the congressional ethics committee, or the Judicial Conference, for appropriate action; except that in the case of the Postmaster General or Deputy Postmaster General, the Director of the Office of Government Ethics shall recommend to the Governors of the Board of Governors of the United States Postal Service the action to be taken.

(7) Each supervising ethics office may render advisory opinions interpreting this title within its respective jurisdiction. Notwithstanding any other provision of law, the individual to whom a public advisory opinion is rendered in accordance with this paragraph, and any other individual covered by this title who is involved in a fact situation which is indistinguishable in all material aspects, and who acts in good faith in accordance with the provisions and findings of such advisory opinion shall not, as a result of such act, be subject to any penalty or sanction provided by this title.

5 C.F.R. § 2634.605 (effective until Dec. 31, 2018)

(a) In general. The designated agency ethics official shall normally serve as the reviewing official for reports submitted to his agency. That responsibility may be delegated, except in the case of certification of nominee reports required by paragraph (c) of this section. See also § 2634.105(q). He shall note on any report or supplemental report the date on which it is received. Except as indicated in paragraph (c) of this section, all reports shall be reviewed within 60 days after the date of filing. Reports reviewed by the Director of the Office of Government Ethics shall be reviewed within 60 days from the date on which they are received by that Office. Final certification in accordance with paragraph (b)(2) of this section may, of necessity, occur later, where additional information is being sought or remedial action is being taken under this section.

(b) Responsibilities of reviewing officials—

> **(1)** Initial review. The reviewing official may request an intermediate review by the filer's supervisor. In the case of a filer who is detailed to another agency for more than 60 days during the reporting period, the reviewing official shall obtain an intermediate review by the agency where the filer served as a detailee. After obtaining any intermediate review or determining that such review is not required, the reviewing official shall examine the report to determine, to his satisfaction that:
>
> > **(i)** Each required item is completed; and
> >
> > **(ii)** No interest or position disclosed on the form violates or appears to violate:
> >
> > > **(A)** Any applicable provision of chapter 11 of title 18, United States Code;
> > >
> > > **(B)** The Act, as amended, and the implementing regulations;
> > >
> > > **(C)** Executive Order 12674, as modified by Executive Order 12731, and the implementing regulations; or
> > >
> > > **(D)** Any other agency-specific statute or regulation which governs the filer.

(2) Signature by reviewing official. If the reviewing official determines that the report meets the requirements of paragraph (b)(1) of this section, he shall certify it by signature and date. The reviewing official need not audit the report to ascertain whether the disclosures are correct. Disclosures shall be taken at "face value" as correct, unless there is a patent omission or ambiguity or the official has independent knowledge of matters outside the report. However, a report which is signed by a reviewing official certifies that the filer's agency has reviewed the report, and that the reviewing official has concluded that each required item has been completed and that on the basis of information contained in such report the filer is in compliance with applicable laws and regulations noted in paragraph (b)(1)(ii) of this section.

(3) Requests for, and review based on, additional information. If the reviewing official believes that additional information is required, he shall request that it be submitted by a specified date. This additional information shall be made a part of the report. If the reviewing official concludes, on the basis of the information disclosed in the report and any additional information submitted, that the report fulfills the requirements of paragraph (b)(1) of this section, the reviewing official shall sign and date the report.

(4) Compliance with applicable laws and regulations. If the reviewing official concludes that information disclosed in the report may reveal a violation of applicable laws and regulations as specified in paragraph (b)(1)(ii) of this section, the official shall:

(i) Notify the filer of that conclusion;

(ii) Afford the filer a reasonable opportunity for an oral or written response; and

(iii) Determine, after considering any response, whether or not the filer is then in compliance with applicable laws and regulations specified in paragraph (b)(1)(ii) of this section. If the reviewing official concludes that the report does fulfill the requirements, he shall sign and date the report. If he determines that it does not, he shall:

(A) Notify the filer of the conclusion;

(B) Afford the filer an opportunity for personal consultation if practicable;

(C) Determine what remedial action under paragraph (b)(5) of this section should be taken to bring the report into compliance with the requirements of paragraph (b)(1)(ii) of this section; and

(D) Notify the filer in writing of the remedial action which is needed, and the date by which such action should be taken.

(5) Remedial action.

(i) Except in unusual circumstances, which must be fully documented to the satisfaction of the reviewing official, remedial action shall be completed not later than three months from the date on which the filer received notice that the action is required.

(ii) Remedial action may include, as appropriate:

(A) Divestiture of a conflicting interest (see subpart J of this part);

(B) Resignation from a position with a non-Federal business or other entity;

(C) Restitution;

(D) Establishment of a qualified blind or diversified trust under the Act and subpart D of this part;

(E) Procurement of a waiver under 18 U.S.C. 208(b)(1) or (b)(3);

(F) Preparation of a written instrument of recusal (disqualification); or

(G) Voluntary request by the filer for transfer, reassignment, limitation of duties, or resignation.

(6) Compliance or referral.

(i) If the filer complies with a written request for remedial action under paragraph (b)(4) of this section, the reviewing official shall indicate, in the comment section of the report, what remedial action has been taken. The official shall also sign and date the report.

(ii) If the filer does not comply by the designated date with the written request for remedial action transmitted under paragraph (b)(4) of this section, the reviewing official shall, in the case of a public filer under subpart B of this part, notify the head of the agency and the Office of Government Ethics, for appropriate action. Where the filer is in a position in the executive branch (other than in the uniformed services or the Foreign Service), appointment to which requires the advice and consent of the Senate, the Director of the Office of Government Ethics shall refer the matter to the President. In the case of the Postmaster General or Deputy Postmaster General, the Director of the Office of Government Ethics shall recommend to the Governors of the Board of Governors of the United States Postal Service the action to be taken. For confidential filers, the reviewing official will follow agency procedures.

(c) Expedited procedure in the case of individuals appointed by the President and subject to confirmation by the Senate. In the case of a report filed by an individual described in § 2634.201(c) who is nominated by the President for appointment to a position that requires the advice and consent of the Senate:

(1) The Executive Office of the President shall furnish the applicable financial disclosure report form to the nominee. It shall forward the completed report to the designated agency ethics official at the agency where the nominee is serving or will serve, or it may direct the nominee to file the completed report directly with the designated agency ethics official.

(2) The designated agency ethics official shall complete an accelerated review of the report, in accordance with the standards and procedures in

paragraph (b) of this section. If that official concludes that the report reveals no conflict of interest under applicable laws and regulations, the official shall:

(i) Attach to the report a description (when available) of the position to be filled by the nominee;

(ii) Personally certify the report by signature, and date the certification;

(iii) Write an opinion letter to the Director of the Office of Government Ethics, personally certifying that there is no unresolved conflict of interest under applicable laws and regulations, and discussing:

(A) Any actual or apparent conflicts of interest that were detected during the review process; and

(B) The resolution of those real or apparent conflicts, including any specific commitment, ethics agreement entered under the provisions of subpart H of this part, or other undertaking by the nominee to resolve any such conflicts. A copy of any commitment, agreement, or other undertaking which is reduced to writing shall be sent to the Director, in accordance with subpart H of this part; and

(iv) Deliver the letter and the report to the Director of the Office of Government Ethics, within three working days after the designated agency ethics official receives the report.

Note: The designated agency ethics official's certification responsibilities in § 2634.605(c) are nondelegable and must be accomplished by him personally, or by the agency's alternate designated agency ethics official, in his absence. See § 2638.203 of this chapter.

(3) The Director of the Office of Government Ethics shall review the report and the letter from the designated agency ethics official. If the Director is satisfied that no unresolved conflicts of interest exist, then the Director shall sign and date the report form. The Director shall then submit the report with a letter to the appropriate Senate committee, expressing the Director's opinion whether, on the basis of information

contained in the report, the nominee has complied with all applicable conflict laws and regulations.

(4) If, in the case of any nominee or class of nominees, the expedited procedure specified in this paragraph cannot be completed within the time set forth in paragraph (c)(2)(iv) of this section, the designated agency ethics official shall inform the Director. When necessary and appropriate, the Director may modify the rule of that paragraph for a nominee or a class of nominees with respect to a particular department or agency.